IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO. 1337 OF 2005
IN
SUIT NO. 2441 OF 1990

Juhu Consumer Stores Ltd. ... Plaintiffs

V/s

Mohammed Ayyaz & ors. ... Defendants

Mr. Anil G. Shah for the plaintiffs/Applicant present in person.

Mr. Ashok Mishra for the defendant No.1.

Mr. S.M. Mungekar, Section Officer - Representative of the Court Officer present.

CORAM: P.V. KAKADE, J.

DATED: 8TH DEC., 2005

P.C.:

1. Heard applicant in person as well as the advocate for the defendants.

2. This notice of motion is preferred by the plaintiffs to seek striking off defendants' defence on the ground that he has failed to comply with several orders passed by this Court and for further direction to the Court Commissioner to recover from defendants or third party a

sum of Rs.22,61,517/- as outstanding as per the order dated 14.12.2004 passed by this Court.

3. Perused the affidavit in support as well as the affidavit in reply filed by the defendant No.1. Also perused the Court Receiver's report which was called for after notice of motion came to be filed.

4. The plaintiffs have filed the suit against the defendants inter-alia for an order of injunction restraining defendants from trespassing and disposing of the plaintiffs from the suit shop, appointment of the Court Receiver in respect of the said suit shop and for other reliefs as set out in the plaint.

By order dated 5.9.1991 this Court passed order appointing the Court Receiver, Mumbai, with direction to appoint the defendant No.1 as an agent of the Court Receiver on payment of Rs.2,000/- p.m. by way of compensation from 1.9.1991. Defendanty No1.1 was also directed to deposit a sum of Rs.6,000/- being three months' royalty as deposit. It was further directed in the said order that, in the event of defendant No.1 committing any two defaults in payment of the monthly royalty amount of Rs.2,000/-, the Court Receiver shall

dispossess and shall put his lock and ask for further order from the Court. By the said order, the defendants were also restrained from making any changes or alterations in the said shop premises for the material which was stored there within one week.

5. Accordingly, the Court Receiver acted on the basis of the said order and put defendant No.1 in possession. There were subsequent interim proceedings in the suit and finally it was transpired that defendant No.1 did not comply with the Court's order and hence the plaintiffs moved this Court on various occasions. In the meantime, in Notice of Motion No. 1199 of 1996 this Court passed order dated 11.7.1996 holding that the defendant No.1 who was holding position as an agent of the Court Receiver in the suit property was also required to pay outgoings of the suit premises. Subsequent several orders were also passed including the order of the Division Bench dated 23.4.1997 holding that the defendant No.1 was required to pay the entire outgoings as directed earlier.

6. On this back ground, it is to be noted that this Court on 14th December, 2004 issued direction to the defendant No.1 to deposit 50% of the arrears from

August, 1983 till that date amounting to Rs.22,51,517/- within one week and was further directed to deposit Rs.11 lacs within one week from the date of that order. However, defendant No.1 failed to do that. Thereafter, further order came to be passed on 21.12.2004 by this Court wherein it was observed that looking to the conduct of the defendant, Court was satisfied that he had no srespect for several years passed by this Court and, therefore, it had become necessary that possession of the said shop premises be re-taken and the agency agreement entered into with the defendant be terminated. Accordingly, the Court Receiver was directed to re-take the physical possession of of the said shop who was found in possession with the help of the police and agency agreement was directed to stand terminated forthwith. The Court Receiver’s report on the basis of which the order was passed was made absolute in terms of prayer clauses (b) & (d).

7. On this back ground of the facts, the present notice of motion is filed by the plaintiffs seeking striking off the defence of the defendant No.1 and for recovery of the amount due from the defendants or third parties. It is to be noted that the notice of motion does not seek possession to be handed over to the plaintiffs

pending the suit but what has been sought for is that pending the hearing of final disposal of the notice of motion, plaintiffs be permitted to use the suit shop without paying any royalty. Suffice it to say, therefore, that the notice of motion is basically for striking off the defence and recovery of the amount from the defendants or third persons which was outstanding as noted by this Court by order dated 14.12.2004.

8. In my considered view, the suit is of 1990 and must be ripe for hearing. Under the circumstances, it would not be just and proper to change the hands regarding the suit properties again so as to give rise to the allegations and counter allegations between the parties pertaining to the possession and, therefore, the Court Receiver’s possession as on today shall remain confirmed pending the suit.

9. So far as the prayer for striking off the defence and recovery of the amount are concerned, those issues shall be determined at the time of final hearing of the suit.

With these directions, the notice of motion stands disposed of with no order as to costs.

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